MOTION FILED

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No. 06-1545

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,

Petitioners,

v.

HOWARD A. ENGLE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF PROFESSORS WHO STUDY PREEMPTION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF PROFESSORS WHO STUDY PREEMPTION LAW TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, Professors Aaron Twerski and Anthony Sebok hereby request leave to file the accompanying *amicus curiae* brief in support of the petition for writ of certiorari to the Supreme Court of Florida. Petitioners have given their consent to the filing of this brief. Respondents have refused consent.

As set forth in the accompanying brief, *amici* are professors of law and have a deep interest in their proper interpretation and application of the federal preemption of state tort law. The *amici* are greatly concerned that the Florida Supreme Court's incorrect interpretation of the 1969 Federal Cigarette & Labeling And Advertising Act is the product of an ambiguity in the plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This ambiguity threatens to produce future unconstitutional results at the trial and appellate levels in both the state and federal courts. Accordingly, the *amici* respectfully request leave to file the accompanying *amicus curiae* brief.

For the foregoing reasons, *amici* respectfully request leave to submit the accompanying brief.

Respectfully submitted.

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BRIEF OF PROFESSORS WHO STUDY PREEMPTION LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Aaron Twerski is a Professor of Law at the Brooklyn Law School. Professor Twerski has taught in the fields of products liability, torts and conflicts of law since 1967 at the Duquesne University School of Law, the Hofstra University School of Law and at Brooklyn Law School and has been a visiting professor of law at the Cornell Law School, the Boston University School of Law and the University of Michigan School of Law. He also recently served as Dean at the Hofstra Law School in Hempstead, New York. He has published voluminously in the field of products liability and tort law. He served as co-reporter for the Restatement (Third) of Torts: Products Liability (1998). In addition he is the co-author of two casebooks on torts and products liability and has published numerous articles in the leading law reviews including the Yale Law Journal, the New York University Law Review, the University of Michigan Law Review, the Cornell Law Review and the Texas Law Review.

Anthony Sebok is a Professor of Law at the Benjamin N. Cardozo School of Law. Professor Sebok has taught in the fields of torts, remedies, constitutional law, and jurisprudence since 1992 at Brooklyn Law School and Cardozo School of Law and has been a visiting professor at Princeton University and the Free University of Berlin. He has published in the fields of tort law, remedies, constitutional law, and jurisprudence, with a special focus on punitive damages. He is the co-author of a casebook on torts and has published in the leading law reviews including the University of Michigan

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

Law Review, the Texas Law Review, the Iowa Law Review, the Southern California Law Review, and the Vanderbilt Law Review.

In light of their academic interests, both Professor Twerski and Professor Sebok have carefully followed a number of cases, including a great many tobacco cases, that raise novel or significant issues in the law of torts, products liability, and preemption. This obviously is such a case.

ARGUMENT

We submit this *amicus* brief to urge the Court to clarify the ambiguities with regard to pre-emption arising out of the 1969 Federal Cigarette & Labeling And Advertising Act as interpreted by *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). These ambiguities have resulted in confusion leading to a split between the circuit courts of appeal and implicating the decision of the Florida courts in the instant case as well. We take no position whatsoever on the substantive issues as to what claims should or should not be pre-empted. We are, however, greatly troubled that so many courts cannot divine the governing law on pre-emption in multiple cases based on the same factual setting.

In *Cipollone*, the court recognized that a narrow class of misrepresentation cases are not pre-empted by the Labeling Act. Clearly, under *Cipollone*, affirmative misrepresentations are not pre-empted. However, much tobacco litigation today does not involve claims of affirmative misrepresentation. The troubling pre-emption issue in tobacco litigation which this Court needs to clarify concerns state law claims based on fraudulent omission or concealment.

The trial court in Florida held that as long as the plaintiff alleged any species of fraudulent omission on the part of the defendants with regard to their communications to the public about the composition and dangers of their products, the plaintiffs' fraud claims would not be pre-empted by the

Labeling Act. This is clearly inconsistent with what this court said in *Cipollone*. The Court held in *Cipollone* that fraudulent omissions based on a common law duty to inform another of a material fact would be pre-empted. In this case the jury was instructed that "federal law does not limit the liability of any defendant against claims based on negligence, strict liability, express warranty, fraud, misrepresentation,or conspiracy." T.37569-70. However, the *Cipollone* Court recognized a category of unpreempted fraudulent omission claims, but it was an extremely narrow one. As the Fifth Circuit has observed:

> The Court differentiated between claims based on failures to disclose through advertising and marketing, which are pre-empted, and failures to disclose through "other channels," which are not. Again, while the district court recognized that some concealment claims may avoid pre-emption, it erred in finding such a claim here.

Brown v. Brown & Williams Tobacco Corp., 479 F.3d 383, 394 (5th Cir. 2007). The *Cipollone* Court illustrated what it meant by channels other than "advertising or promotion" by referring to a duty to disclose information to an administrative agency.

In the wake of *Cipollone*, the majority of courts have held that common-law claims of fraudulent omission do not come within the narrow exception described above and therefore have found such claims pre-empted. *See, e.g., Johnson v. Brown & Williamson Tobacco Corp.*, 122 F.Supp. 2d 194, 201 (D. Mass. 2000); *Sonmenreich v. Philip Morris, Inc.*, 929 F.Supp. 416, 419 (S.D. Fla. 1996); *Lacey v. Lorillard Tobacco Co.*, 956, 962 (N.D. Ala. 1997); *Griesenbeck v. Am. Tobacco Co.*, 897 F. Supp. 815, 823 (D.N.J. 1995).

Other courts, however, have adopted the position that common-law fraudulent omission cases might not be preempted if there is a state common law obligation to utilize

some hypothetical channel other than "packaging, advertising, and promotion. *See Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142, 1148-49 (9th Cir. 2005).

This case illustrates two troubling aspects of the circuit split over this Court's decision in *Cipollone*.

First, did this Court intend to exclude from pre-emption *all* common-law fraudulent omission cases when it used as an illustration a statutory duty "to disclose material facts about smoking and health to an administrative agency"? *Cipollone*, 505 U.S. at 528. Scholars are legitimately puzzled on this point. In Professor Twerski's *Products Liability* casebook, for example, the authors engage in a "dialogue" triggered by one's report that "students tell me that they don't understand the kinds of fraud actions that are not federally preempted." JAMES HENDERSON & AARON TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 436-37 (5th ed. 2004). Professor Twerski describes the plurality's discussion of claims involving fraudulent concealment as "somewhat baffling," adding that "I honestly don't know what they are saying and what's worse, I don't know why they are saying it." *Id.* at 436; *see also id.* at 437 ("I've said it before and I'll say it again – I just don't get it.").

Second, assuming the Court envisioned excluding from pre-emption some common-law fraudulent omission claims, and not others, what specific "channels of communication" – outside of advertising and promotion – did the Court have in mind? Is there more to this category than the plurality's allusion to a hypothetical law mandating disclosures to a state administrative agency? Since even the Ninth Circuit in *Rivera* assumed that packaging is subsumed within "advertising and promotion" we have difficulty imagining what might be left.

In this respect, we note that the jury instructions implicitly upheld by the Florida Supreme Court raise the same issues that troubled this court in *Philip Morris USA v. Wil-*

liams, 127 S. Ct. 1057 (2007). In *Williams*, the jury instructions allowed the defendant to be punished for conduct that injured a non-party, and it was impossible for the appellate courts to determine whether the verdict was based on unconstitutional grounds. Similarly, in this case the jury instructions preclude any finding that the liability verdicts were predicated only on the narrow fraudulent concealment exception arguably created in *Cipollone*. Although the Florida Supreme Court should have rejected the jury instructions on these grounds, it can be partially excused for its omission because the preemption exception that might have supported the jury verdict has been left undefined for so many years.

If, in fact, there are other channels not covered by preemption, the Court should inform the lower courts so that they can fashion constitutionally valid jury instructions adequate to test whether the plaintiffs have met their burden of proof on duty and causation. The stakes in ongoing tobacco litigation are too substantial to leave the matter in uncertainty any longer than necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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